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ATTENTION: Examiner Shumaya B. Ali
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ART/UNIT NO: 3771
FROM: Alison Parker for Guy V. Tucker, Reg #45,302
DATE: October 22, 2007
APPLICATION NO: 10/729,847
OUR REFERENCE NO: 0138.00

TOTAL NUMBER OF PAGES 8 (INCLUDING COVER PAGE)

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MESSAGE:

Examiner Ali,

Following this cover sheet, please find a Reply Brief for submission in the above-referenced application.

Thank you,
Alison Parker
for: Guy V. Tucker, Reg #45,302

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Alston	Group Art Unit: 3771
Application No: 10/729,847	Examiner: Ali, Shumaya B
Confirmation No: 8316	Attorney Docket No: NK.0138.00
Filed: December 5, 2003	
Title: AEROSOLIZATION APPARATUS WITH ROTATING CAPSULE	October 22, 2007 San Francisco, California

REPLY BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Examiner:

In response to the Examiner's Answer mailed on August 21, 2007, the Applicant of the above-referenced patent application (hereinafter Appellant) hereby maintains the appeal to the Board of Patent Appeals and Interferences. Appellant requests the reversal of the Final Rejection.

Certificate of Transmission

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, facsimile transmitted to the U.S. Patent and Trademark Office at (571) 273-8300, or electronically submitted, on the date shown below.

By: 

Alison R. Parker

Date: 10/22/07

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OCT 22 2007

NK.0138.00
Application No: 10/729,847
Page 2 of 7

Status of Claims

Claims 1-20 are presently pending in the case. Claims 1-20 have been finally rejected. The appeal of the rejection of each of claims 1-20 is hereby maintained.

NK.0138.00
Application No: 10/729,847
Page 3 of 7

Grounds of Rejection to be Reviewed on Appeal

Appellant continues to request review of the Examiner's following grounds of rejection:

Claims 1-7, 10-17 and 20, rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 4,249,526 to Dean et al (hereinafter Dean et al).

Claims 8 and 18, rejected under 35 U.S.C. § 103(a) as being unpatentable over Dean et al.

Claims 9 and 19, rejected under 35 U.S.C. §103(a) as being unpatentable over Dean et al in view of U.S. Patent 5,614,217 to Chiprich et al (hereinafter Chiprich et al).

Argument

Appellant believes each of claims 1-8 and 10-17 are improperly rejected and are therefore allowable for the reasons set forth in Appellant's Appeal Brief filed on June 8, 2007. The present Reply Brief is being filed to specifically address some of the issues raised by the Examiner in the Examiner's Answer mailed on August 21, 2007. The comments herein are merely supplemental to the arguments made in the Appeal Brief and are not meant to replace those arguments.

Dean et al does not disclose an apparatus that is identical to the claimed apparatus

The Examiner erroneously states on page 9 of the Examiner's Answer that "Deal et al. (sic) discloses an apparatus that is identical to the claimed apparatus..." The Examiner then pictorially compares Dean et al's Figure 1 and Appellant's Figure 1E. However, what the Examiner fails to mention is that the capsule in Dean et al and the capsule in Appellant's Figure 1E rotate about different axes. To clarify the issue, Appellant has reproduced below the drawings provided by the Examiner. To the right of the drawings, Appellant has added arrows showing the direction of rotation of a capsule in the respective devices. Note that with the orientation of the Dean et al figure, the capsule actually rotates end over end on a plane that is perpendicular to the sheet of paper, making the showing of the direction difficult in that view. Appellant has slightly offset the arrows from their plane for the purpose of showing the direction as clearly as possible from the perspective given. As can be seen, the capsule rotates about a different axis in the Appellant's claimed device than the capsule in Dean et al.

NK.0138.00
Application No: 10/729,847
Page 5 of 7

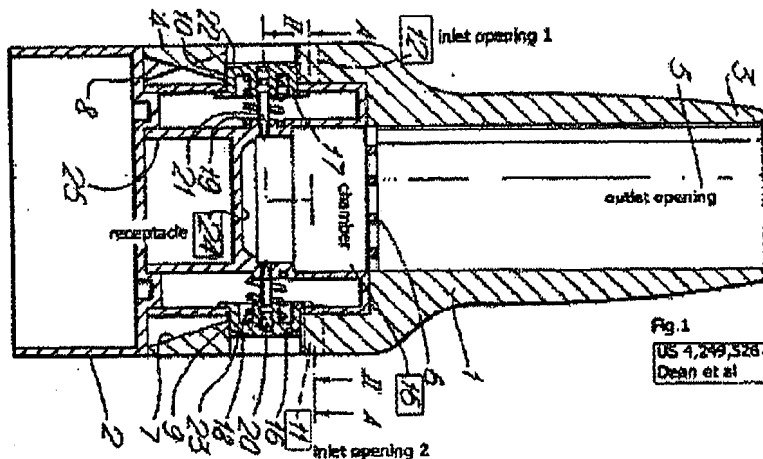


Fig. 1
US 4,249,528
Dean et al

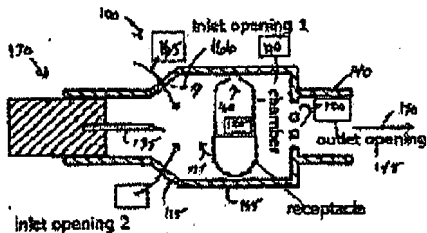


Fig. 1E
Applicant's invention

DRAWINGS PROVIDED BY EXAMINER
IN EXAMINER'S ANSWER

ARROWS ADDED BY
APPELLANT TO SHOW
DIRECTION OF
ROTATION OF
CAPSULE RELATIVE
TO DEVICE DRAWINGS

As can be seen by viewing the above drawings with the added arrows, the device of Dean et al and the claimed apparatus are not at all identical.

The Examiner's reasoning is not consistent with 35 U.S.C. §102(b)

The Examiner posits on page 10 of the Examiner's Answer that the limitations of Appellant's claim 1 would be met if a user were to grasp the Dean et al device improperly so as to cover selected inlets on the device and thereby create a airflow

NK.0138.00
Application No: 10/729,847
Page 8 of 7

pattern that would result in an anticipation of Appellant's claim 1. Appellant disagrees with this reasoning on many grounds. First, it is purely speculative that the Examiner's suggested manner of holding the device would even result in the airflow pattern proposed by the Examiner. Second, it is not clear that the geometric configuration of Dean et al would even allow for the capsule rotation that is recited by Appellant in claim 1. Third, a modification of the use of the Dean et al device as suggested by the Examiner is not the purview of a rejection under 35 U.S.C. 102(b). For at least these reasons and for the reasons set forth in the Appeal Brief, claim 1 is not anticipated by Dean et al.

The claimed capsule rotation is not merely an intended use

The Examiner incorrectly states that the limitations of claim 1 with regard to the capsule rotation is an intended use of the apparatus and does not afford the limitation patentable weight. Contrary to the Examiner's position, the limitations of claim 1 relate to structural features of the claimed apparatus, not to the manner in which the apparatus is used. Accordingly, the positively recited structural limitations should be given full patentable weight.

The Examiner acknowledges that Chiprich et al does not teach the claimed rotation

Concerning the rejection of dependent claims 8, 9, 18, and 19 under 35 U.S.C. §103(a), Appellant acknowledges with appreciation the Examiner's admission that the teaching reference, Chiprich et al, is not relied on to teach the rotational arrangement recited in the independent claims (see Examiner's Answer page 12). Accordingly, Chiprich et al is not relevant in the determination of the patentability of independent claims 1 and 10. Since claims 1 and 10 are patentable for the reasons discussed above and in the Appeal Brief, the claims depending therefrom are also allowable.

NK.0138.00
Application No: 10/728,847
Page 7 of 7

Conclusion

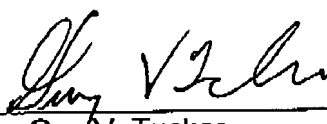
Thus, it is believed that all rejections made by the Examiner have been addressed and overcome by the above arguments and the arguments provided in the Appeal Brief. Therefore, all pending claims are allowable. A reversal is respectfully requested.

Should there be any questions, Appellant's representative may be reached at the number listed below.

Respectfully submitted,

JANAH & ASSOCIATES

Dated: 22 OCT 2007

By: 
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